U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 18 2005

EAC 02 211 50473

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a provider of contract software developers. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 10, 2001. The proffered wage as stated on the Form ETA 750 is $83,600 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 1997.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $507,954, net annual income of $23,785 and to currently employ 10 workers. In support of the petition, the petitioner submitted its unsigned 2001 corporate tax return reflecting taxable income below the proffered wage.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 4, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its corporate tax return for the petitioner for the years 2002 reflecting a net loss. In addition, counsel submitted Forms W-2, Wage and Tax Statements the petitioner issued to the beneficiary in 2001 and 2002. The Forms W-2 Wage and Tax Statements reflect wages of $84,142.92 and $86,672 respectively, more than the proffered wage.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director concluded that the amounts on the Form W-2 were not credible since the total wages paid by the petitioner, $165,026 in 2001 and $106,673 in 2002, could not cover salaries for an additional nine employees after deducting the wages reflected on the beneficiary's Form W-2.

On appeal, the petitioner asserts that it only employed five employees in 2001 and two employees in 2002. The petitioner submits internal payroll records for several employees for 2000. The petitioner also submitted internal payroll records for the beneficiary in 2003 reflecting wages of $87,887.93, more than the proffered wage. Finally, the petitioner submitted the beneficiary's personal tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed and paid the beneficiary the full proffered wage in 2001 and 2002. While the petitioner's statement that it only employed five employees in 2001 fails to explain why it listed 10 current employees on the petition, it remains that the record consistently reflect wages paid to the beneficiary in excess of the proffered wage. Thus, we need not inquire further into the petitioner's ability to pay the proffered wage.

While the petitioner has overcome the director's basis for denial, the director failed to consider whether the beneficiary is an advanced degree professional and whether he is qualified for the certified job. To determine whether a beneficiary is eligible for a second preference immigrant visa, Citizenship and Immigration Services (CIS), formerly the Service or INS, must ascertain whether the alien is, in fact, qualified for the classification and the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulation at 8 C.F.R. § 204.5(k)(2) provides, in pertinent part:

> A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) provides:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree of a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The Form ETA-750 indicates that the job requires a "B.S." degree in computer science or a related technical field or equivalent plus five years of experience. The beneficiary listed a "diploma" after three years of study from Instrumentation Engineering in India and a "PG Diploma" after one year of study at Datapro Information Technology in India. The petitioner submitted an evaluation from Multinational Evaluations & Transitions Services concluding that the beneficiary's diploma in instrumentation engineering "is equivalent to a three-year program of academic studies in Instrumentation Engineering and transferable to an accredited University in the United States." The evaluation then concludes that the beneficiary's postgraduate diploma "is a one semester of academics studies in computer applications." Ultimately, the evaluation concludes that the beneficiary's "education and professional experience are equivalent to an individual with a Bachelor degree in Instrumentation Engineering & Computer Science from an accredited University in the United States."

The director requested an evaluation of just the beneficiary's education. In response, the petitioner submitted a new evaluation from AUAP Credential Evaluation Services. The evaluation lists the beneficiary's education and experience and concludes that they are equivalent to a Bachelor of Science degree in computer science from a regionally accredited institution of higher education of the United States. Note 1 of the evaluation, however, indicates that the beneficiary's academic credentials alone "are equivalent to an Associate Degree in Computer Science from a regionally accredited institution of higher education of the United States of America." Note 3 explains that only by including the beneficiary's work experience does the evaluator reach the conclusion that the beneficiary has the equivalent of a U.S. baccalaureate degree.

We will remand the matter for a determination by the director as to whether the beneficiary's education meets the terms of the labor certification and whether it suffices to qualify the beneficiary as an advanced degree professional. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.